

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1438

To be argued by
BARBARA S. JONES

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1438

UNITED STATES OF AMERICA,

Appellee,

—v.—

RUSSELL BUFALINO, MICHAEL SPARBER, and
HERBERT JACOBS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

BARBARA S. JONES,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. Government's Case	2
1. The Debt	3
2. The Enforcement	6
B. The Defense Case	12
POINT I—The Trial Judge Properly Denied Defendants' Motions for a Mistrial Based on Third Party Contact with the Jury	13
A. The Facts	13
B. The District Court's Findings	16
C. There was no contact relating to a matter pending before the jury	17
POINT II—The Trial Judge Properly Denied the Motions to Suppress the Nagra Tapes and the Testimony of Jack Napoli	21
A. The Facts	21
B. The Trial Court Correctly Applied the Standard of <i>United States v. Miranda</i>	23
POINT III—There Was Ample Evidence to Find a Violation of Title 18, U.S.C., § 894	26
POINT IV—The Court's Charge Was Correct	31
A. The Court Was Not Required Specifically to Charge the Jury That It Must Find the Defendant Intended to Instill Fear	31

	PAGE
B. The Court Correctly Charged the Jury as to Finding an Extension of Credit	34
C. The Trial Court Did Not Err in Refusing to Give an Uncalled Witness Charge as to the Government's Tape Expert	35
POINT V—The Defendants Received a Speedy Trial	37
POINT VI—There Was No Violation of Due Process Resulting from Napoli's Participation in the Witness Relocation Program	41
POINT VII—There Was No Error in the Sentencing Procedure	43
POINT VIII—Separate Sentences May Be Imposed for the Conspiracy and Substantive Offenses Under Title 18, U.S.C. § 894	46
POINT IX—The Trial Court Was Correct In Precluding Evidence Of The Lapadura <i>Nolle</i>	48
CONCLUSION	50

TABLE OF CASES

<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	39, 40
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	48
<i>Braverman v. United States</i> , 317 U.S. 49 (1942) . . .	46
<i>Callanan v. United States</i> , 364 U.S. 587 (1961) . .	46, 47
<i>Dutton v. Evans</i> , 400 U.S. 74 (1970)	49
<i>Freeman v. United States</i> , 146 F.2d 978 (6th Cir. 1945)	48

	PAGE
<i>Giles v. Maryland</i> , 386 U.S. 66 (1967)	48
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	30
<i>Horning v. District of Columbia</i> , 254 U.S. 135 (1920)	35
<i>Iannelli v. United States</i> , 420 U.S. 770 (1975)	46
<i>Jeffers v. United States</i> , — U.S. —, 53 L.Ed. 2d 168 (1977)	47
<i>Morgan v. United States</i> , 399 F.2d 93 (2d Cir.), cert. denied, 393 U.S. 1025 (1969)	20
<i>Pereira v. United States</i> , 347 U.S. 1 (1953)	
<i>Perez v. United States</i> , 402 U.S. 146 (1971)	29
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946) ...	46
<i>Remmer v. United States</i> , 347 U.S. 227 (1954) ..	17, 19
<i>Rochin v. California</i> , 342 U.S. 165 (1952)	42
<i>United States v. Annerino</i> , 495 F.2d 1159 (7th Cir. 1974)	28, 29
<i>United States v. Anzalone</i> , 555 F.2d 317 (2d Cir. 1977)	26
<i>United States v. Araujo</i> , 539 F.2d 287 (2d Cir. 1976)	31
<i>United States v. Arroyo</i> , 494 F.2d 1316 (2d Cir.), cert. denied, 419 U.S. 827 (1974)	30
<i>United States v. Augello</i> , 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972) ...	24, 25
<i>United States v. Austin</i> , 529 F.2d 559 (6th Cir. 1976)	47, 48
<i>United States v. Baca</i> , 494 F.2d 424 (9th Cir. 1974)	20
<i>United States v. Benson</i> , 548 F.2d 42 (2d Cir. 1977)	27

<i>United States v. Berger</i> , 433 F.2d 680 (2d Cir.), cert. denied, 401 U.S. 962 (1971)	17, 20
<i>United States v. Berger</i> , 433 F.2d 680 (2d Cir.), cert. denied, 401 U.S. (1971)	17, 20
<i>United States v. Brasco</i> , 516 F.2d 816 (2d Cir.), cert. denied, 423 U.S. 860 (1975)	17
<i>United States v. Briola</i> , 465 F.2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973) ...	28, 29
<i>United States v. Bryant</i> , 448 F.2d 1182 (D.C. Cir. 1971)	24
<i>United States v. Burke</i> , 417 F.2d 377 (2d Cir. 1975)	26
<i>United States v. Carden</i> , 428 F.2d 1116 (2d Cir. 1970)	45
<i>United States v. Carini</i> , 562 F.2d 144 (2d Cir. 1977)	39, 40
<i>United States v. Covello</i> , 410 F.2d 536 (2d Cir. 1968), cert. denied, 396 U.S. 879 (1969)	26
<i>United States v. DeStafano</i> , 429 F.2d 344 (2d Cir. 1970)	47
<i>United States v. DiStefano</i> , 555 F.2d 1094 (2d Cir. 1977)	26
<i>United States v. Dixon</i> , 536 F.2d 1388 (2d Cir. 1976)	31
<i>United States v. Dozier</i> , 522 F.2d 224 (2d Cir.), cert. denied, 423 U.S. 1021 (1975)	31, 32
<i>United States v. Fasanaro</i> , 471 F.2d 717 (2d Cir. 1973)	40
<i>United States v. Feola</i> , 420 U.S. 671 (1975)	46
<i>United States v. Ferguson</i> , 486 F.2d 968 (6th Cir. 1973)	18

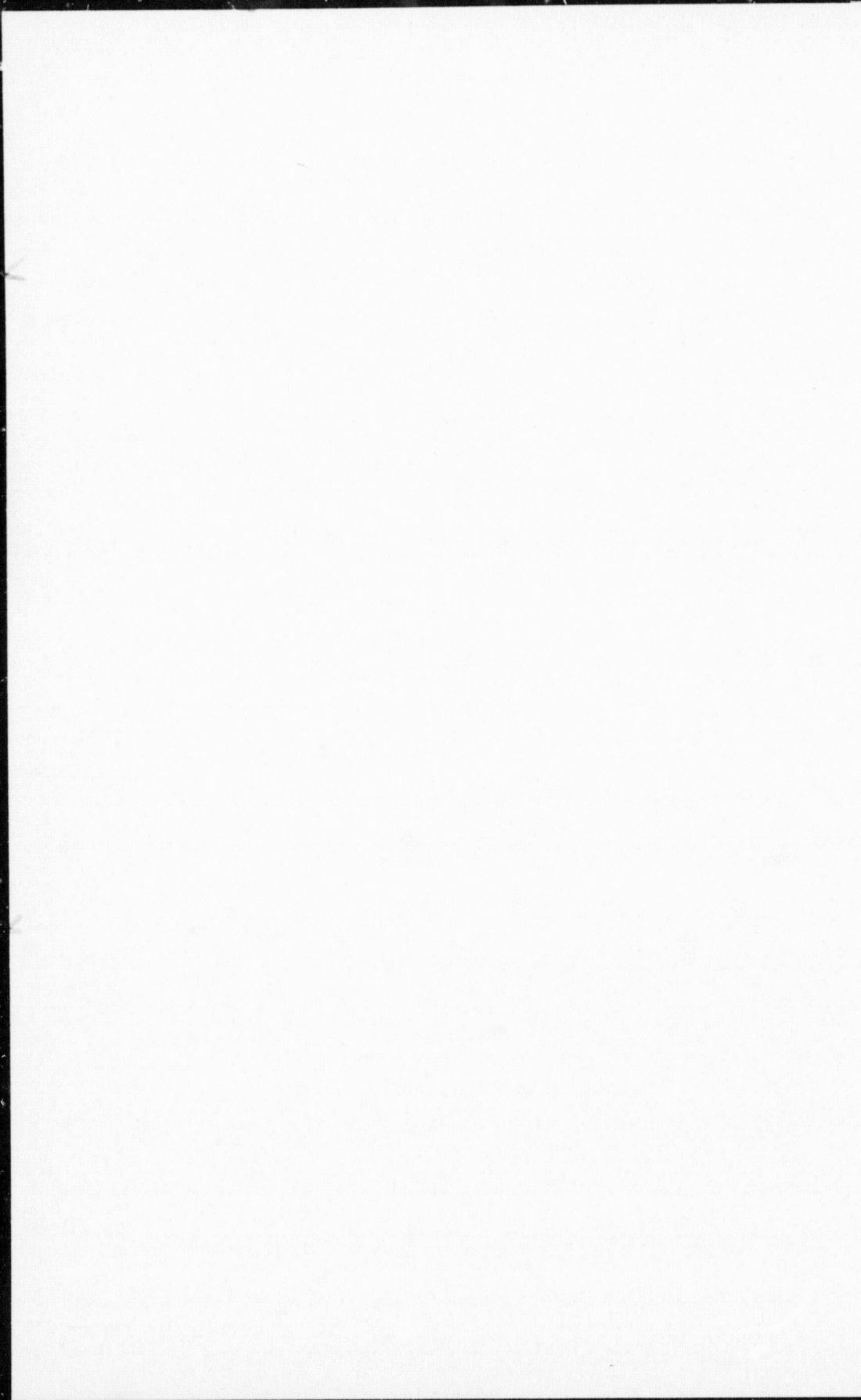
	PAGE
<i>United States v. Flynn</i> , 216 F.2d 354 (2d Cir. 1954), cert. denied, 348 U.S. 909 (1955)	21
<i>United States v. Fourine</i> , 428 F.2d 865 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971)	35
<i>United States v. Gersh</i> , 328 F.2d 460 (2d Cir.), cert. denied, 377 U.S. 992 (1964)	18, 20
<i>United States v. Jones</i> , 360 F.2d 92 (2d Cir. 1966), cert. denied, 385 U.S. 1012 (1967)	26
<i>United States v. Keresty</i> , 465 F.2d 36 (3d Cir.), cert. denied, 409 U.S. 991 (1972)	29
<i>United States v. Lane</i> , 561 F.2d 1075 (2d Cir. 1977)	40
<i>United States v. LaRocca</i> , 224 F.2d 859 (2d Cir. 1955)	36
<i>United States v. Llamas</i> , 280 F.2d 392 (2d Cir. 1960)	36
<i>United States v. Lubrano</i> , 529 F.2d 633 (2d Cir. 1975), cert. denied, 429 U.S. 818 (1976)	17
<i>United States v. Martinez-Carcano</i> , 557 F.2d 966 (2d Cir. 1977)	31
<i>United States v. Mase</i> , 556 F.2d 671 (2d Cir. 1977)	26, 29
<i>United States v. Miller</i> , 381 F.2d 529 (2d Cir.), cert. denied, 392 U.S. 929 (1968)	19
<i>United States v. Miranda</i> , 526 F.2d 1319 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976) ..	23, 25, 36
<i>United States v. Miranda</i> , 526 F.2d 1319 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976)	23, 25, 36
<i>United States v. Natale</i> , 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976)	35

	PAGE
<i>United States v. Needles</i> , 472 F.2d 652 (2d Cir. 1973)	45
<i>United States v. Panebianco</i> , 543 F.2d 447 (2d Cir. 1976)	21
<i>United States v. Pfingst</i> , 490 F.2d 262 (2d Cir. 1973), <i>cert. denied</i> , 417 U.S. 919 (1974)	24
<i>United States v. Pravato</i> , 505 F.2d 703 (2d Cir. 1974)	32
<i>United States v. Rabinowich</i> , 238 U.S. 78 (1915) ...	47
<i>United States v. Ravich</i> , 421 F.2d 1196 (2d Cir.), <i>cert. denied</i> , 400 U.S. 834 (1970)	26
<i>United States v. Rivera</i> , 513 F.2d 519 (2d Cir.), <i>cert. denied</i> , 423 U.S. 948 (1975)	32
<i>United States v. Roberts</i> , 515 F.2d 642 (2d Cir. 1975)	40
<i>United States v. Robin</i> , 545 F.2d 775 (2d Cir. 1976)	43, 45
<i>United States v. Rosner</i> , 485 F.2d 1213 (2d Cir. 1973)	44
<i>United States v. Rosner</i> , 516 F.2d 269 (1975)	24
<i>United States v. Russell</i> , 411 U.S. 423 (1963)	43
<i>United States v. Russo</i> , 442 F.2d 498 (2d Cir. 1971)	42
<i>United States v. Saglimbene</i> , 471 F.2d 16 (2d Cir. 1972), <i>cert. denied</i> , 411 U.S. 966 (1973)	40
<i>United States v. Santiago</i> , 528 F.2d 1130 (2d Cir.), <i>cert. denied</i> , 425 U.S. 972 (1976)	31
<i>United States v. Sperling</i> , 560 F.2d 1050 (2d Cir. 1977)	47

	PAGE
<i>United States v. Taylor</i> , 562 F.2d 1345 (2d Cir. 1977)	20
<i>United States v. Terrell</i> , 474 F.2d 872 (2d Cir. 1973)	26
<i>United States v. Virga</i> , 426 F.2d 1320 (2d Cir. 1970)	44
<i>United States v. Vispi</i> , 545 F.2d 328 (2d Cir. 1976)	40
<i>United States v. Zanfardino</i> , 496 F.2d 887 (2d Cir.), cert. denied, 419 U.S. 830 (1974)	20
<i>United States ex rel. Moore v. Fay</i> , 238 F. Supp. 1005 (S.D.N.Y. 1965)	20
<i>Williamson v. United States</i> , 311 F.2d 441 (5th Cir. 1962)	42

TABLE OF STATUTES AND AUTHORITIES

113 Cong. Rec. 17998 (1967)	30
Federal Rules of Criminal Procedure, Rule 30	31
Federal Rules of Criminal Procedure, Rule 43	20
Federal Rules of Criminal Procedure, Rule 52(b) ..	31
Plan for Achieving Prompt Disposition of Criminal Cases	38
Title 18, United States Code, Section 891	27, 32
Title 18, United States Code, Section 894	27, 29, 32
Title 18, United States Code, Section 3161	38
1968 U.S. Code Cong. & Adm. News 2029	29



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1438

UNITED STATES OF AMERICA,

Appellee,

—v.—

RUSSELL BUFALINO, MICHAEL SPARBER, and
HERBERT JACOBS,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Russell Bufalino, Michael Sparber and Herbert Jacobs appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, after a seven day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury. The judgment of conviction was entered as to Jacobs on October 7, 1977 and, as to Bufalino and Sparber, on October 21, 1977.

Indictment 76 Cr. 982 was filed in two counts on October 26, 1976. Count One charged Bufalino, Sparber and Jacobs with conspiring to collect extensions of credit, by extortionate means, in violation of the conspiracy section of Title 18, United States Code, Section 894. Count Two charged each of the defendants with the

substantive crime of extortion in violation of Title 18, United States Code, Section 894.*

Trial began on August 1, 1977, and concluded on August 10, 1977, when the jury found each defendant guilty on both counts.

On October 7, 1977, Judge Lasker placed Herbert Jacobs on probation for a term of three years and fined him \$2500. On October 21, 1977, Judge Lasker sentenced Russell Bufalino to a four year term of imprisonment on Count One to be followed by five years probation on Count Two and fined him \$10,000 on each count. On the same date, Judge Lasker sentenced Michael Sparber to one year in prison on Count One to be followed by five years' probation on Count Two.

Bufalino, Sparber and Jacobs are at liberty on bail pending this appeal.

Statement of Facts

A. Government's Case

Introduction

The Government's proof established that during mid-February, 1976 New York City jeweler Herbert Jacobs gave approximately \$25,000 worth of jewelry to Jack Napoli on credit. By the end of February, when Napoli had failed to pay any of the money, Jacobs went to Russell Bufalino and Michael Sparber to help him collect. During the first two weeks of March, Sparber threatened

* Joseph Lapadura, a/k/a "Lefty," was also charged in both counts of the indictment. However, an order of nolle prosequi was entered as to him on June 28, 1977.

Napoli over the telephone and unsuccessfully attempted to get Napoli to meet with him. Instead Napoli went to Florida in mid-March to meet with Bufalino directly to try to settle the matter. In Florida, Bufalino threatened Napoli, and ordered him to pay the debt and to meet with Sparber in New York.

By the end of March, knowing that he would not be able to come up with the money and frightened by the threats, Napoli contacted the Federal Bureau of Investigation ("FBI"). Between March 31, 1976 and April 20, 1976 Napoli was ordered to four meetings with one or more of the defendants. Threats of harm to Napoli and to his wife and children were made at these meetings, including a threat by Bufalino on April 12, 1976 that he would kill Napoli if he failed to pay the debt.

The Government's principal witnesses at trial were Jack Napoli and his wife Geraldine. The Government also introduced tape recordings of Napoli's meeting with the defendants on April 12, 16 and 20, 1976, and recordings of numerous telephone calls between Napoli and the defendants. These recordings were made at the direction of the FBI with Napoli's consent. Several agents of the FBI also testified. Their testimony established the integrity of the tape recordings, identified Bufalino's voice on the April 12 tape and, through surveillance photographs, placed Sparber and Bufalino at one or more of the meetings.

1. The Debt

On February 12, 1976 Jack Napoli contacted New York City jeweler, Herbert Jacobs. He told Jacobs his name was Jack Caringi, that he was a friend of Russell Bufalino and that Bufalino had recommended Jacobs to

him for jewelry. (Tr. 61-62).^{*} (This was a story. Napoli had merely heard of Jacobs through his friend Larry Bufalino, a cousin of Russell.) (Tr. 62-64). Jacobs agreed to meet Napoli a few days later at his office at 62 West 47th Street. At this meeting Jacobs gave Napoli a diamond ring and two smaller cocktail rings on approval. Napoli gave Jacobs a bad check for \$6,000, which was Jacobs' price for the diamond. Napoli then sold the diamond to a jeweler at 24 West 47th Street for \$2,000 cash, which Napoli then used to pay a creditor by the name of Joe Bonamo. (Tr. 66-69).

During the next several days Napoli called Jacobs again, told him he would keep the diamond and that Jacobs should put the \$6,000 check through. He also told Jacobs he wanted another stone and would be in the next day to get it. (Tr. 69).

On that following day, Jacobs gave Napoli another diamond which Jacobs claimed was worth \$7500. Napoli sold this diamond the same day to a jeweler named Arnold Yeager for \$3,300 cash. With this money Napoli paid off the rest of his debt to Bonamo. (Tr. 70-71).

Within a few days Jacobs learned that the \$6,000 check was drawn on insufficient funds. When Jacobs called Napoli, Napoli told him he would get the \$6,000, but in the meantime his brother needed a ring. Napoli then sent his brother, Anthony, to Jacobs who gave the brother another diamond. Napoli got \$2,000 for this stone from Arnold Yeager and immediately paid off another debt. (Tr. 71-74).

A few days later, Herbert Jacobs called Napoli and asked him when he was going to get his money. Napoli

^{*} "Tr." refers to the trial transcript; GX refers to Government Exhibits received in evidence at trial; DX refers to Defense Exhibits; "H Tr." refers to the transcript of the suppression hearing; "Br." refers to appellants' briefs; "App." to appellants' appendices; "S Tr." refers to the transcript of the Bufalino sentencing.

said he would get all the money together and straighten it out with him. (Tr. 74).

Meanwhile Napoli was also being pressed to pay a \$4,000 debt he owed Andrew Marmo. A few days later, Marmo's brother Frankie and a man named Chalky George picked Napoli up at his home in Bayonne and drove him into New York to see Herbert Jacobs. In the apparent hope of helping Napoli get another diamond from Jacobs which he and Frankie would take to satisfy part of Napoli's debt to Andy Marmo, Chalky George went up to Jacobs' office with Napoli and tried to pass a stolen teller's check to Herbert Jacobs. Jacobs immediately discovered it was stolen by calling the bank. (Tr. 75-80).

At that point, Jacobs tried unsuccessfully to reach Russell Bufalino by telephone. He next called John Francis and put Napoli on the phone with him. Napoli repeated to Francis the story that he was a friend of Russell Bufalino and added that he was Jimmy Napoli's nephew. He also told Francis about the diamonds he had obtained from Herbert Jacobs. (Tr. 81-82). After this call, Jacobs told Napoli "that he was going to get in touch with Russell Bufalino and tell him what was going on and that he wanted his money. He wanted to get paid and he didn't want to know nothing." (Tr. 82).

However, Jacobs phoned Napoli later that day and told him that someone had seen Napoli as he was leaving Jacobs' office and had told Jacobs that Napoli was a friend of Russell Bufalino. Jacobs then told Napoli if he came to the office the next day, Saturday, he would give him another diamond. Napoli met Jacobs "downstairs" from Jacobs' office and Jacobs gave him another diamond which he said was worth about \$5500. Two days later Napoli gave this diamond to Marmo to sell. (Tr. 83-85).*

* Frankie Marmo was to apply \$2,000 of the proceeds to the debt to Andy Marmo and split the rest with Napoli. Napoli never saw the diamond or Marmo again. (Tr. 85).

2. The Enforcement

Every day for the next two weeks Herbie Jacobs called Napoli at his home in Bayonne. (Tr. 85, GX 18). During his first telephone conversation with Napoli, Jacobs told him that he had spoken to Russell Bufalino and that Bufalino was mad, and "if I knew what was good, I would get this thing straightened out, I would get the merchandise or the money back to him right away." Jacobs also told Napoli that Bufalino had said, "if he had you here he would throw you out the window." (Tr. 86).

During a second conversation, Jacobs told Napoli again that he wanted his money, or his merchandise, adding that if he didn't do the right thing he was going to get hurt. (Tr. 86). Jacobs also told Napoli on several occasions that "it was going to be out of his hands pretty soon, he wasn't going to hold anybody off any longer and he wanted the money and he better get paid." (Tr. 87). Finally, Jacobs told Napoli that he would be getting a phone call from a guy named "Mike." (Tr. 88).

During the first week of March, Napoli received two telephone calls from Michael Sparber. Sparber told Napoli that Napoli had \$25,000 worth of his friend's merchandise and that he wanted the merchandise or the money or he would burn Napoli's house down and he didn't care who got hurt.* (Tr. 90). Sparber also asked Napoli to meet him at the Vesuvio Restaurant. Napoli did not go. During the second telephone conversation Sparber told Napoli "you better get things squared away if you don't want to get hurt. You better come up with the merchandise or the money." (Tr. 91).

Later in March, Napoli arranged through Larry Bufalino to meet with Russell Bufalino about the debt to

* Napoli resided at 341 Kennedy Boulevard, Bayonne with his girl friend, now wife, and her three children. (Tr. 531, 555).

Jacobs. Larry set up the meeting for Wednesday, March 24, 1976 at the Gold Coast Restaurant in Hollywood, Florida. Present were Russell Bufalino, Larry Bufalino, Jack Napoli and Frank Gagliardi. (Tr. 92-93; GX 8 and 9).

Russell Bufalino asked Napoli why he had used his name to get the merchandise. Napoli lied to Bufalino and told him that he had given all of the jewels to Frankie Marmo to sell. (Tr. 94). Russell Bufalino also asked him why he didn't keep any of the appointments with Mike Sparber. Then Bufalino called Sparber in New York from the restaurant and told Napoli, "This is my friend, Mike." He told Napoli to talk to him, set up another appointment with him "[a]nd make sure you keep it this time." (Tr. 95-96). Napoli was then put on the phone and Sparber told him to meet him in New York at 1:00 p.m. on Wednesday, March 31st, at the Vesuvio Restaurant. (Tr. 96-97).

Russell Bufalino then questioned Napoli about Frankie Marmo. When Napoli told Russell Bufalino that Marmo was crazy, "a cowboy and not afraid of anybody," Bufalino stated, "I don't care how crazy he is. I've taken care of a lot bigger and better guys like him for a lot less." (Tr. 97-98). Bufalino also told Napoli that if it wasn't straightened out he (Napoli) was going to get hurt. (Tr. 505).

Before returning to New York Napoli again spoke to Russell Bufalino, who told him that he would see Napoli in New York April 5th and that he should keep his appointment with Sparber. (Tr. 100-101). At this point, realizing that he would not be able to come up with the money, and fearful of Bufalino, Napoli contacted both the FBI and New York State authorities. (Tr. 502-05, 208).

On March 31, 1976 Napoli accompanied Larry Bufalino to the Vesuvio Restaurant. They were met there by Herbert Jacobs, Mike Sparber, Eddie Sciandra and Joseph Lapadura. At this meeting Mike Sparber told Napoli that the \$25,000 debt was on his shoulders, that he would have to pay it and that, "[o]ne way or another we will get our money." (Tr. 102). Joseph Lapadura also told Napoli that if he didn't take care of it he was in for a lot of trouble and was going to get hurt. (Tr. 108-109).

On April 5, 1976 Napoli again went to the Vesuvio Restaurant to meet with Russell Bufalino. He was accompanied by Larry Bufalino and was met there by Mike Sparber. Mike Sparber told Napoli that Russell Bufalino wouldn't be in until that night and that Napoli was to meet him at Johnnie's Restaurant on 45th Street. At about 7:30 p.m. Napoli, his wife, Geraldine and Larry Bufalino went to Johnnie's. Mike Sparber was already there when they arrived. (Tr. 110-11).

At about 8:30 p.m. Russell Bufalino arrived with Joseph Lapadura, Eddie Sciandra and two or three other men. This group walked back into the dining room. Sometime later Larry Bufalino told Napoli that Russell Bufalino wanted to talk to him. Napoli proceeded to a table where Russell Bufalino and Sparber were sitting. Russell Bufalino asked Napoli when he was going to straighten things out. Napoli told him he needed some time to get the money together. (Tr. 112-13). When Sparber told Napoli he had 48 hours to come up with the money or the merchandise, Napoli told them that he could not do it. Napoli then asked to speak to Russell Bufalino alone. Napoli and Bufalino went outside. Napoli told Bufalino he needed time, at least two weeks to get the money. Bufalino told him he had ten days to "do it, the right thing." (Tr. 113-15).

When Napoli walked back into the restaurant he saw his wife, Geri, talking to Mike Sparber and he saw that she was crying. (Tr. 116). At the trial, Geri Napoli testified that Sparber had told her, "I am telling you this one thing. If Jack doesn't do the right thing we will take care of the kids first, then you and then him." (Tr. 117, 542).

A few days after this meeting at Johnnie's, Sparber called Napoli and told him to be at the Vesuvio Restaurant on Monday, April 12th at 1:00 p.m. (Tr. 119). Napoli went to the Vesuvio that day, wearing a Nagra recording device placed on him with his consent by the FBI. (Tr. 120). Shortly after entering the restaurant Russell Bufalino and several men who accompanied him into the Vesuvio confronted Napoli and the following conversation occurred:

NAPOLI: Hello, RUSS.

BUFALINO: You know, you cocksucker, one of these days you know you're going to allow me to do things I never did in my fuckin' life.

NAPOLI: You wanna shake my hand?

BUFALINO: No, I ain't going to shake your hand.

NAPOLI: You're mad at me right?

BUFALINO: . . . because you're a cocksucker. And you gonna do it, don't do the right thing, I'm going to kill you—cocksucker and I'm going to do it myself and I'm going to go to jail just for you. You big cocksucker, you have no fucking reason to . . . you have no reason to do this, what you did. .

NAPOLI: What did I do? I says I'll take care of it. I'll make good for the things.

BUFALINO: You'd better take care of it.
(long pause) (Tr. 121-22; GX 1, 1A).

To further drive home his point, Bufalino kicked Napoli. After the kick, Bufalino walked away.

Napoli then had a short conversation with Mike Sparber, telling him he would come back with a stone that day. Bufalino then told Sparber to take Napoli outside. (Tr. 122-23). Once outside Sparber told Napoli he would wait all day for him at Vesuvio, and he ordered Larry Bufalino to stay with Napoli, while he went to get the stone. Napoli then drove around with Larry and pretended to look for a jeweler. (Tr. 124-25).

Napoli returned to the Vesuvio later that afternoon, without a stone, but had no further discussion with Sparber or Bufalino. (Tr. 155). The following day Napoli called Larry Bufalino at the Vesuvio and Mike Sparber got on the telephone. Sparber told Napoli to be at the restaurant on Friday, April 16th. (Tr. 158; GX 2 and 2B).*

Napoli arrived at the restaurant on the 16th, again wearing a Nagra body recorder and also carrying \$1,000 supplied to him by the FBI. When he arrived he was met outside by Michael Sparber. (Tr. 168, 174). Sparber asked Napoli if he brought the money and told him to come inside the Vesuvio or he would "tell two goons to come and drag" him in. Once inside Napoli counted out the \$1,000 to Sparber and told Sparber he wanted to be

* On the following day, April 14, 1976 Napoli had two telephone conversations with Herbert Jacobs. During the first conversation, Jacobs told Napoli that Sparber had just left his office and that he knew Jack was supposed to see him on Friday. (Tr. 158-59; GX 2C). During the second call, Jacobs acknowledged that he knew Russell Bufalino was also going to be at the Vesuvio on Friday. (Tr. 164; GX 3, 3A).

sure Russ knew he had paid. Sparber told him he would give the money to "Lefty" who would give the money to Russell Bufalino over Easter. Sparber also told Napoli that, "this whole thing is on my lap. I'm the one who is responsible," and that if he hadn't shown up he would have been in trouble. Sparber then told Napoli to be back Monday or Tuesday with more money. (Tr. 168-74; GX 4, 4A).*

On Tuesday, April 20, 1976 Napoli went to the Vesuvio Restaurant with a second payment of \$500.** He was met by Mike Sparber, to whom he paid the money. He and Sparber then agreed that he would satisfy the debt by paying \$1,000 a week, until he had paid \$27,000. That, Sparber said, would be acceptable to the "old man", the nickname used for Russell Bufalino. (Tr. 199-201, 92; GX 6, 6A).

There were no further personal contacts between Napoli and Sparber or Bufalino. On May 10, 1976, however, Napoli telephoned Herbert Jacobs. Napoli told Jacobs that he was away but was trying to get the money together. Jacobs asked him to send something. Napoli replied that had to pay the money to Mike and Russ.

* During this meeting on the 16th, Sparber also arranged for Jimmy Napoli, whom he described as one of Russell Bufalino's partners, to be at the Vesuvio to see if he could identify Jack Napoli. Jimmy Napoli denied that Jack Napoli was related to him. (Tr. 173-74).

** Three telephone calls preceded Napoli's visit to the Vesuvio on April 20. On the 19th he spoke to Jacobs, who told him, "they told me they spoke to you and arrangements were made, that's the last I heard." (Tr. 189-90; GX 3, 3C). On the same day Sparber and Napoli discussed the possibility of bringing Chalky George in so that Mike could make him "give up his end on whatever the fuck his involvement is." (Tr. 192-93; GX 3, 3D). Finally, on the morning of the 20th Napoli called Bufalino at his hotel, but Bufalino refused to talk to him, saying, "Look I don't want to talk over the phone." (Tr. 197; GX 5, 5A).

Jacobs acknowledged this, but called himself the agent for Russ and Mike and asked Napoli where he was. Jacobs also told Napoli that if he showed good faith, "they're not gonna kill ya." (Tr. 203-05; GX 7, 7A). At this point Jack Napoli had been placed in the Witness Relocation Program. (Tr. 207).

The Defense Case

None of the defendants took the stand.

Bufalino unsuccessfully attempted to show, through the testimony of two United States Marshals, that Napoli's debts were guaranteed by the Government while he was in the Witness Relocation Program. (Tr. 751-52, 762, 754, 770). He also presented the testimony of John Pietruska, the owner of a Bayonne, New Jersey Lumber Company, who testified that a person he knew as Jack Napoli signed an invoice as Jack Napoli in his presence. (Tr. 828; DXO) Napoli had previously testified that it looked like his writing but that he had not signed it. (Tr. 326).

Sparber sought to discredit the testimony of Jack and Geraldine Napoli solely as to the unrecorded April 5th threats by presenting his wife's testimony and that of the FBI case agent Steven Edwards. Linda Sparber testified that she sat next to Geraldine Napoli at the bar during the entire period of time her husband was at the bar at Johnnie's and that at no time did Sparber or anyone else threaten Geraldine Napoli. (Tr. 734-36). Counsel for Sparber then called Edwards to establish that none of the FBI reports contained a statement by Jack Napoli as to the threats to Geraldine Napoli made on April 5, 1976. (Tr. 783-84).

Jacobs presented no witnesses but he did offer into evidence a document of the New York City Police Department showing that on July 7, 1976 Herbert Jacobs made

a complaint that a person whom he knew only as Jack Caringi gave him a check written against insufficient funds back in February of 1976. It also showed that upon re-interview Jacobs told authorities if he uncovered additional information he would contact them. (DXE; Tr. 776-77). However, this attempt to portray Jacobs as a law abiding citizen who would not use threats to obtain repayment from Napoli could not succeed. The Government's proof had already shown that all of the threats by the defendants had been made during the period February to May 1976 and that Jacobs knew Caringi to be Jack Napoli long before July 1976, yet he failed to give this information to the police.

ARGUMENT

POINT I

The Trial Judge Properly Denied Defendants' Motions for a Mistrial Based on Third Party Contact with the Jury.

A. The Facts

On August 1, 1977 during the opening statements one or two male spectators, sitting with a group of spectators, laughed out loud. One or two of these same men were later seen by the court getting into a car with the defendant Russell Bufalino. (Tr. 229).

On August 2nd, the prosecutor reported to the court that she had seen and heard some of the trial spectators making loud comments in the hall outside the courtroom at times when the jury was also present in the hall. She requested an instruction to the spectators that they remain inside the courtroom until the jury was able to leave by the elevators. Judge Lasker gave such an instruction. (Tr. 51-52, 55) The Assistant also informed the court

that the Government's main witness Jack Napoli had reported to her that some spectators were making gestures at him during his trial testimony. (Tr. 228).

On the morning of August 3, 1977 the deputy Court Clerk reported to the District Court and counsel that some of the jurors had told her they were nervous, that they were being glared at by a couple of spectators as they came in and out of court, and that they found themselves bumping into spectators both in the elevators and outside. (Tr. 226-27).

When Judge Lasker asked for suggestions from all counsel as to how to proceed in light of this information, counsel for Bufalino moved for a mistrial which was denied by the Court. (Tr. 246). The Government suggested sequestration in order to prevent any further third party-juror contact or, as the alternative, that the jurors at least be kept together at lunch times with a marshal. (Tr. 228). Judge Lasker then proposed that he question each of the jurors on the record without counsel. This procedure was agreed to by all. (Tr. 229-31).

The results of the court's voir dire showed the following: Nine of the jurors had heard no statements from spectators or noticed any unusual conduct by the spectators.*

* These jurors were Silver, (Tr. 233); Krieger, (Tr. 237-38); Sledge, (Tr. 239-40); Daniels, (Tr. 241), Perfetto, (Tr. 241-42); Worth (Tr. 242-43); and Valentine (Tr. 238-39) and alternate jurors Napper (Tr. 243); and Breswell (Tr. 243-44). Mrs. Sledge and Mrs. Daniels did report that a young girl they had seen sitting in the Courtroom came into the ladies room while they were in there but that she had spoken to no one. (Tr. 239-41). This incident was similarly described by juror Ortiz. (Tr. 240). Juror Worth reported that he had an unnerving feeling looking at the spectators but assured the Court it would not affect his judgment in voting on the case. (Tr. 243); and juror Valentine reported that when he heard some jurors complain about being followed by spectators, he suggested they bring it to the Court's attention.

Four of the jurors reported that some of the spectators either stared at them as they went in and out of the jury box or tried to make eye contact with them.* But each said that this conduct had no influence on them or their judgment. Juror Coleman reported, in addition to eye contact, that he saw a spectator in the public men's room after the first day of trial. The man asked Coleman, "You know, I don't understand about this thing, can you explain it?" Coleman told him he was a juror and refused to speak to him further. (Tr. 236).

Finally, an incident involving the forelady, Ms. Henry, and jurors White and Ortiz was reported, along with the fact that each of them saw one or two spectators around when they went to lunch the previous day. Ms. Henry stated that while she stood waiting for the elevators in the company of other jurors she commented out loud, "When is Con Edison going to send me a bill for this month?" At this point a spectator said to her, "Oh yes, just like that case going on in there. They are trying to get \$40,000, for some tax something." After reporting this and being asked whether the conduct of the spectators would affect her judgment, Ms. Henry told the court that she was for "law and peace." (Tr. 232). Ms. White told the court she overheard the spectator speak to Ms. Henry but indicated that nothing had happened to prevent her from rendering a fair verdict in the case. (Tr. 235). Ms. Ortiz said she had seen the incident but had not heard what the spectator said, and assured the court that nothing had happened which would affect her judgment. (Tr. 240).

At the conclusion of his voir dire of the jurors Judge Lasker reported his findings to counsel and invited coun-

* These were jurors Scheps (Tr. 234) Ortiz, (Tr. 240-41), Coleman (Tr. 236-37); and the forelady Mrs. Henry (Tr. 232).

sel to review the transcript and make any further requests the following morning, August 4, 1976. (Tr. 251). The defendants then renewed their motion for a mistrial. It was denied. The Government then moved for sequestration. This motion was opposed by defense counsel and denied by the court. (Tr. 253).

No defense counsel raised this issue again from August 3 until some seven days later on August 10, after the court had already charged the jury and was about to send them into deliberations. (Tr. 1012). At just that point counsel for Sparber requested that the court voir dire the alternate jurors. (Tr. 1013). The court reviewed the responses of these two jurors given on August 3rd, and found that neither of them had heard any statements from the spectators nor noticed any unusual conduct. The Court also noted that since August 3rd the spectators had not been in court and no additional complaints had been made by the jury. (Tr. 1019). On these bases, Judge Lasker denied the motion.

B. The District Court's findings

The court found that only four jurors had had any actual contact with the spectators. (Tr. 244). Specifically, Judge Lasker found that the comments to the forelady by the spectator constituted a contact, but that the spectator's statement was one "not necessarily relating to the subject matter of the case." The court also found that the statements made by the spectator in the men's room to Mr. Coleman constituted a contact, but that the incident showed only an attempt to start a conversation. (Tr. 245). Finally, Judge Lasker concluded that none of the jurors was intimidated in any way and he stated, "I am satisfied that in spite of the fact that there is some affirmative material which I have just brought to your attention that the jury is intact and it has not been adversely affected in the degree that would require even

serious consideration of a mistrial." (Tr. 246). He also later specifically stated, ". . . the trier of the facts believes, and everything is on the record, that no juror was intimidated or resentful but simply that they were annoyed and wanted to bring their annoyance to the attention of the court for the very good reason of eliminating an extraneous factor." (Tr. 1023).

C. There was no contact relating to a matter pending before the jury

The law is settled that a showing of an unauthorized communication by a third party with a juror "during a trial *about the matter pending before the jury*" is presumed prejudicial and is grounds for a new trial unless the Government can establish at a hearing "that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229 (1954). However, that presumption of prejudice is totally inapplicable here since none of the contacts between the jurors and spectators involved anything touching upon the trial. While it appears that attempts were made to engage jurors in discussion about the trial, none was successful. In short, there was no prejudicial content to any of the third party communications which could influence the jurors and, "where an unauthorized private communication, contact, or tampering with a juror during a trial does not relate to a matter pending before the jury, there is no right to a new trial absent a showing of prejudice by the defendant." *United States v. Brasco*, 516 F.2d 816, 819 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975). See also *United States v. Lubrano*, 529 F.2d 633, 638 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Berger*, 433 F.2d 680, 686 (2d Cir.), *cert. denied*, 401 U.S. 962 (1971).

The defendants here can make no such showing, although they attempt to do so by arguing that the jurors

must have associated these contacts with one or more of the defendants.* Even if the jurors did associate these spectator contacts with the defendants there is still no prejudice. Nothing said during any contact contained any facts, outside the record, or even a hint of either bribery or threat,** and Judge Lasker found that the jury's reaction "has been that this is a nuisance, putting it at the worst." (Tr. 252).

Furthermore, this Court has refused to grant a new trial in at least two instances where the possibility of prejudice from the jury contact was considerably greater than here. In *United States v. Gersh*, 328 F.2d 460 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964), the forelady of the jury received a series of anonymous phone calls immediately prior to the start of deliberations. In *United*

* The record on this issue requires some discussion. At p. 252 it reads: "The Court: The jurors do associate these people with Mr. Bufalino." It is clear from other discussion, however, that this must be an error. At p. 251 the Court stated: "I believe that people about whose conduct any remark was made by the members of the jury who did make any remark were in the entourage, company of Mr. Bufalino. No juror attributed any association between any spectator and any defendant." This was the Court's finding immediately after his voir dire of the jury on August 3rd, and a review of that voir dire confirms this finding. A week later, however, on August 10th Judge Lasker in attempting to recall his voir dire did state that "... it is reasonable to conclude that one or more of the jurors who had something positive to report did, I think, and I may be reading my own estimate into it, did conclude that the spectators to whom they referred were associated in some way or another with one or more of the defendants." But he then reiterated, "Although I told you long since that I happened to see the spectators in the presence of Mr. Bufalino. No juror told me that they saw that or concluded that." (Tr. 1019).

** This case is clearly distinguishable from *United States v. Ferguson*, 486 F.2d 968 (6th Cir. 1973), where a friend of the defendant made comments to a juror favorable to the defendant and specifically discussed an aspect of the case.

States v. Miller, 381 F.2d 529 (2d Cir.), cert. denied, 392 U.S. 929 (1968), a juror was warned to be "very careful" if he wanted to avoid being beaten up. In neither case did the juror attribute the contact to any defendant but in each case it was reasonable to assume that they certainly did not attribute it to the Government. Further, in *Miller* this Court approved the use of an *in camera* voir dire with the consent of defense counsel, which is precisely the situation here, and found no error in the trial court's refusal of a later request by the defendants to grant them time to interview the jurors prior to consideration of their motion for a new trial. In so finding the Court stated,

"The case is entirely different from *Remmer v. United States*, 347 U.S. 227 (1954), where the trial court apparently did not even interview the juror in question and the record did not show 'what actually transpired'; as the later opinion made clear, 350 U.S. at 379-380, 76 S. Ct. at 427, 'It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kinds of facts alleged' that 'made manifest the need for a full hearing.' Here the judge had developed the facts by interrogating the jurors, with counsel agreeing not to be present; there was thus no occasion for subjecting the jurors to a further inquiry." *United States v. Miller*, *supra*, at 540.

In this case all counsel agreed to allow Judge Lasker to conduct an *in camera* voir dire. At no point did the defendants request a hearing and they allowed a week to pass after the District Court's voir dire before requesting that the trial judge ask additional questions of the two alternate jurors at a point moments before the case was to go to the jury. Under these circumstances, especially when viewed in light of the innocuous nature of the contacts, the defendants are not now entitled to a new

trial. See, *United States v. Gersh*, *supra* at 464; and *United States ex rel. Moore v. Fay*, 238 F. Supp. 1005 (S.D.N.Y. 1965).

Bufalino's additional complaint that the trial court violated his rights under Rule 43 of the Federal Rules of Criminal Procedure is also meritless. (Br. 15) While it is true that private communications between judge and jury may violate the defendant's right to be present at all stages of the proceedings, it is also clear that the defendants waived this right when their counsel consented in advance to the court's use of an *in camera* voir dire. See *United States v. Taylor*, 562 F.2d 1345, 1365 (2d Cir. 1977). Even had they not consented or been unaware of the proceeding, such communications are subject to the harmless error rule and do not rise to the level of reversible error absent a showing of prejudice by the defendants. *United State v. Berger*, *supra* at 686; *United States v. Baca*, 494 F.2d 424 (9th Cir. 1974).

In this case the court's voir dire discovered the nature of the contacts and their content and enabled the court to determine from these facts, as well as the jurors' demeanor, that the jurors had not been affected as to their ability to judge the case.* Any additional questions the

* The defendants make much of the fact that Ms. Henry, the forelady, did not specifically state that her judgment had not been affected when asked that question by the court but responded instead "I am for law and peace." We submit that it was entirely proper for the trial court to find that her judgment was not affected. First, the content of the conversation which she related to the court viewed objectively could have had no effect on her judgment. Second, the court was able to assess any effect on her not just from her few words in response to one question but also from her demeanor and the tenor of all her comments. Such a determination is the function of a trier of fact, *United States v. Zanfardino*, 496 F.2d 887 (2d Cir.), *cert. denied* 419 U.S. 830 (1974) and may not be set aside on appeal unless "clearly erroneous." *Morgan v. United States*, 399 F.2d 93, 97 (2d Cir.), *cert. denied* 393 U.S. 1025 (1969).

defendants wanted asked were suggested a week later and then were suggested only with regard to the alternate jurors. Under these circumstances Judge Lasker's use of the voir dire and his refusal to make further inquiry could not possibly constitute a clear abuse of discretion. See *United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977); *United States v. Flynn*, 216 F.2d 354 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955).

POINT II

The Trial Judge Properly Denied the Motions to Suppress the Nagra Tapes and the Testimony of Jack Napoli.

A. The Facts

An evidentiary hearing was held in two parts on May 5th and 9th, 1977. At this hearing the Government presented the testimony of Paul Ginsberg, of Professional Audio Laboratories, who was qualified as an expert in the field of audio engineering, and Stephen F. Edwards, the FBI case agent in charge of all tape recordings in this case. The defendants presented no witnesses. The facts adduced at the hearing are as follows:

On three occasions during the investigation which resulted in the indictment in this case, the FBI equipped Jack Napoli with a Nagra recorder and a Kel transmitter. On each occasion the two units operated simultaneously. The Nagra recorder is a self-contained tape recording unit which recorded its own tape of the conversation on each occasion. The Kel broadcasted transmissions of the conversation on each occasion which were intercepted by the FBI over radio receivers in surveillance units, where these transmissions were then recorded by a tape recorder in the unit.

The FBI case agent, Steven Edwards testified that his principal purpose in using the Kel transmitter had been for Napoli's protection and that the transmissions were taped only as a back-up procedure "to have something salvageable" should the Nagra malfunction. (H. Tr. 104).

After the surveillances, Edwards listened to both the Nagra and Kel recordings obtained of each conversation, at one sitting, one after the other. He testified, and the court credited his testimony, that the Kel recordings were seriously inferior to those made on the Nagra machine, "very distorted and static" (Tr. 80) and, indeed, "largely inaudible." (H. Tr. 79). Having compared the recordings and found the Nagras to be "far superior" to any of the Kels (H. Tr. 79-80), he concluded there was no use for the Kel recordings.* Edwards then consulted with brother agents, who confirmed his understanding that it was standard FBI procedure to destroy such tapes. Accordingly, he disposed of them.

The court found that although Edwards' destruction of the Kel tapes was wilful, there was no "hint of bad faith in this record." Moreover, the court found that there was "no reason to believe that any material on the Kel tapes which might have clarified some of the inaudible portions of the Nagra tapes, assuming such material existed, would have been favorable to the defense, in

* Although Judge Lasker did *not* find that it would be impossible for a Kel transmitted recording to contain any more audible portions than the simultaneously made Nagra recording of the same conversation, which was the uncontroverted expert testimony of Paul Ginsberg, Judge Lasker did take note of the facts 1) that Edwards' testimony was emphatic that there was nothing on the Kel tapes which was not also on the Nagras (Tr. 151-52); 2) that Kel recording are often of poor quality and Nagras are of good quality and 3) that the Nagra tapes which he listened to for audibility were "of exceptional clarity as tape recordings of this kind go." (Sparber App. A-45).

view of the nature and content of the Nagra recordings." (Sparber App. A-46).

B. The Trial Court Correctly Applied the Standard of *United States v. Miranda*.

In determining whether or not to suppress the Nagra recordings or the testimony of Jack Napoli after the intentional destruction by the FBI of simultaneously recorded Kel tapes, the court applied the standard announced by this Circuit in *United States v. Miranda*, 526 F.2d 1319, 1325-26 (1975), *cert. denied*, 429 U.S. 821 (1976), that a court is required to weigh "the extent of the Government's culpability for the loss or destruction and the amount of prejudice to the defense which resulted." While the court found the Government's culpability high since the destruction was intentional, it also found that it was done in good faith. On the other hand the court found the arguments of prejudice raised by the defendants to be singularly weak. (Sparber App. A-44). In so doing, the court specifically rejected the speculation on the part of the defendants that material may have existed on the Kel tapes which would have been favorable to the defense. He did so based on his assessment of the "nature and content" of the Nagra recordings.

An examination of the transcript of the April 12, 1976 encounter between Bufalino and Napoli is illustrative of this point. It contains a complete conversation between the two men at the Vesuvio Restaurant with no inaudible portions from beginning to end. (GX 1, 1A). While the defendant Bufalino advanced an alternative explanation for why he threatened to kill Napoli, both in his opening and through cross-examination of Napoli, the recording itself leaves no room for the suggestion that either additional or different statements were made by Bufalino during this encounter. Likewise the recorded statements of Michael Sparber, made on April 16, 1976

also show an explicit, consistent purpose to collect the Jacobs debt from Napoli. It is difficult to imagine, and unreasonable to assume, that Sparber made other additional comments which were somehow helpful to his defense, and that these comments were only recorded by the far inferior Kel unit and were somehow lost on the Nagra recording. Further, the testimony at trial clearly established that Napoli had no opportunity to tamper with the Nagra tapes because of their sealed condition and perhaps most importantly no suggestion has been made by Sparber as to what these "missing" portions may have contained. Thus the District Court's decision is wholly supported by the facts. See *United States v. Rosner*, 516 F.2d 269, 272-73 (2d Cir. 1975); *United States v. Pfingst*, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974).

There is also no merit to the defendants argument that the mere fact that the destruction was deliberate requires suppression. In fact, in *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972), the *only* tape recordings of a conversation between the defendant and the Government's principal witness were intentionally destroyed by the police because they were said to be unintelligible. In rejecting the argument that the police should not have been permitted to testify to the conversation because of the destruction of the tapes this Court stated, "while the degree of compliance by the police agents with existing departmental regulations is not clear, the record taken as a whole gives no indication of such bad faith or negligence in the destruction of the allegedly unintelligible tapes as would call for the suppression of the testimony of the police agents." The same results were reached by the Court in *United States v. Bryant*, 448 F.2d 1182, 1184 (D.C. Cir. 1971), another case where even though the *only* tapes made were intentionally destroyed, the Court went on to balance Govern-

ment's culpability against prejudice and did not apply any automatic suppression standard on the basis of the intentional destruction.

Further, this case is factually distinguishable from both *Miranda* and *Augello* in a very important aspect. In each of those cases the *only* recording of a conversation subsequently testified to at trial was destroyed, and therefore the possibility that exculpatory material may have existed on those tapes could never be ruled out. In this case, no such claim is reasonable. Special Agent Edwards testified that the Kel tapes he destroyed were far less audible than the Nagra tapes which were preserved and an expert testified that it would be impossible for a Kel-transmitted recording to contain any more audible portions than the Nagra recording of the same conversation. Further, the court found the existing Nagra recordings to be of generally high quality and took judicial notice of the fact that Kel recordings were often of poor quality. In this case, the best recording and consequently the best evidence of the three conversations the Government hoped to introduce were carefully preserved, and there was no suggestion that the Nagra recordings had been tampered with in any way.*

This is a case of the destruction of an inferior duplicate original, not the total destruction of original evidence. In fact, this Circuit, when confronted with the somewhat analogous situation of an agent destroying his rough interview notes, has consistently held that "the Jencks Act, 18 U.S.C. § 3500, imposes no duty on the part of law enforcement officers to retain rough notes when

* Although Bufalino and Sparber now feel free to suggest that Napoli could have tampered with the Nagra tape, (Bufalino Br. 30, Sparber Br. 28n.), neither made any effort in the District Court to establish any factual basis for that suggestion through testing of the Nagra recordings or through expert testimony.

their contents are incorporated into official records and they destroy the notes in good faith." *United States v. Terrell*, 474 F.2d 872, 877 (2d Cir. 1973). And in *United States v. Anzalone*, 555 F.2d 317, 321 (2d Cir. 1977), this Court further held that it could not find that such notes constituted *Brady* material without more of a showing that the handwritten interview notes would have been helpful to the defense. See also *United States v. Mase*, 556 F.2d 671, 676 (2d Cir. 1977); *United States v. DiStefano*, 555 F.2d 1094, 1105 n.11 (2d Cir. 1977); *United States v. Covello*, 410 F.2d 536, 545 (2d Cir. 1968), *cert. denied*, 396 U.S. 879 (1969); *United States v. Jones*, 360 F.2d 92, 95 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967). The holding of these cases *a fortiori* support Judge Lasker's conclusions in this case where duplicate originals were involved.

In conclusion, the application of the exclusionary rule here, where the destruction of the tapes was undertaken in good faith and the defendants can show no prejudice to themselves nor any benefit to the Government, would be, as the District Court concluded, totally unwarranted. Cf. *United States v. Burke*, 417 F.2d 377 (2d Cir. 1975); *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

POINT III

There Was Ample Evidence to Find a Violation of Title 18, U.S.C., § 894.

All three defendants argue that there was insufficient evidence to support their convictions under 18 U.S.C. § 894, which prohibits extortionate collections of extensions of credit. The gist of their arguments is that because Napoli did not intend to pay Jacobs for the jewels when he obtained them, there was no agreement to defer pay-

ment of a debt and therefore no extension of credit. (Buffalino Br. Point X, Sparber Br. Point C, Jacobs Br. Point I). This argument overlooks the clear meaning of the statute, its legislative history, and applicable case law. Similarly, it ignores the fact that Napoli *did* enter into an express agreement with Jacobs to pay for the jewels on each occasion he obtained them. Even though his private intention was to avoid paying Jacobs, he never in any way denied that he had agreed to pay him or denied that he was obligated to pay. An agreement to defer payment certainly existed whether or not Napoli intended to honor it, and the jury was entitled to so find.

At the outset, it must be remembered that Section 894 prohibits the collection of *any extension of credit* by extortionate means. The definition of "to extend credit" is "to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred." 18 U.S.C. § 891(1). Thus the language of the statute clearly encompasses any debt, no matter how it arose.

Further, both the Tenth and Seventh Circuits have already rejected the premise of defendants' argument, which is that if the property involved in the transaction giving rise to the debt is stolen from the defendant or another, then it does not fulfill the statute's requirement for an extension of credit.* In *United States v. An-*

* This argument is in some sense similar to the one made by the defendants in *United States v. Benson*, 548 F.2d 42 (2d Cir. 1977) which was rejected by this Court. In *Benson*, the Court found that the criminal background of the victim of the crime and the fact that he may not have been the owner of the property of which he was defrauded was irrelevant to the conviction of the defendants.

nerino, 495 F.2d 1159 (7th Cir. 1974), an indebtedness was incurred through the victim's unauthorized use of the defendant's credit cards and misappropriation of partnership funds. In *United States v. Briola*, 465 F.2d 1018 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973) the victim placed losing bets under another's name with his bookmaker employer, denied that he had placed them but accepted responsibility for the debt. In each of these cases the Courts found extensions of credit within the meaning of the statute, despite the fact that acknowledgment of the debt by the debtor necessarily came at a point in time *after* he had stolen property from the defendant. Clearly, theft is a transaction which gives rise to a debt and the acceptance of responsibility to pay such a debt "prior to or contemporaneously with the use of force to collect it" will be sufficient to find an extension of credit. *United States v. Briola*, *supra* at 1021. There can be no dispute that here Napoli acknowledged responsibility for the debt from the outset.

Defendants' second argument is that the transaction in this case is not one properly regulated by Congress. Although defendant Sparber does concede that this statute can be sustained as falling within Congress' power to make uniform laws concerning bankruptcy, he argues that Napoli's swindles do not result in a debt dischargeable in bankruptcy and that therefore this rationale does not apply to the facts of this case. Then, in an attempt to distinguish this case from *Annerino*, he argues that "a subsequent agreement apparently settled the embezzlement claim and replaced it with a promise to repay the funds," thus making the Annerino debt one dischargeable in bankruptcy. (Sparber Br. 46). An analysis of the facts in this case reach precisely the same conclusion. Napoli clearly acknowledged the debt, once he was found out, and continuously promised to repay it.

The defendants also contend that Congress did not intend § 894 to apply to the facts here because this was neither a formal loan nor a loansharking operation. However, the legislative history of the Act itself, states that:

"Sec 894 (A) . . . (makes) . . . it a criminal offense to collect an indebtedness by extortionate means, regardless of how the indebtedness arose." *Conf. Rep. No. 1397 90th Cong. 2d Sess. (1968)* *U.S. Code Cong & Adm. News*, p. 2029

See also *United States v. Keresty*, 465 F.2d 36 (3d Cir.), cert. denied, 409 U.S. 991 (1972). And, in discussing the use of extortionate means to collect a gambling debt, this Circuit has stated, "we think Congress intended to cover such activity even if the creation of the debt and the extortionate collection are not engaged in by members of organized crime or loansharks." (emphasis added) *United States v. Mase*, 556 F.2d 671, 674 (1977).^{*} Clearly, the intent of Congress in enacting 18 U.S.C. § 894 was to focus on the use of extortionate means in order to collect debts, regardless of whether the transaction was a formal loan or not. *United States v. Annerino*, *supra* at 1377; *United States v. Briola*, *supra*, at 1020.

Sparber also argues that there is nothing to suggest that "a shopkeeper's efforts to obtain the return of fraudulently misappropriated property, . . . is exclusively or substantially within the "class of activities" of organized crime. (Sparber Br. 45). This ignores the plain fact that when shopkeeper's efforts are to resort to the use of extortionate means then we have precisely the

^{*} Further, in *Mase*, this Court did not rely on the fact that the underlying debt was a gambling debt in finding the extortionate activity was covered by 18 U. S. C. § 894. Rather it found that, "under the Commerce Clause, Congress has the power to regulate the extortionate credit transaction in which Mase was involved, though purely intrastate. *Perez v. United States*, 402 U.S. 146, 154 (1971)."

"class of activity" proscribed. The broad wording of the statute alone suggests a congressional finding that extortion per se is the "class of activity" proscribed. And, in a discussion of the extortionate credit transactions section of the Truth in Lending Bill at least one Senator stated explicitly that he found extortion along with gambling, narcotics, loan sharking and prostitution to be an illegal activity which was a source of funds for organized crime. 113 Cong. Rec. 17998 (June 29, 1967).

Bufalino makes the additional arguments that the evidence is insufficient to prove that he intended to threaten Napoli, or that even if he did intend to threaten him, it was not for the purpose of collecting an extension of credit. These contentions are unsupported by the record viewed, as it must be, in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), cert. denied, 419 U.S. 827 (1974). The evidence proved that after Jack Napoli failed to pay, Herbert Jacobs contacted Russell Bufalino. (Tr. 86). Shortly after this, Napoli also received a call from Michael Sparber who threatened to burn his house down if he failed to come up with the money or the merchandise. (Tr. 91). At this point Napoli decided to go to Florida to see Russell Bufalino about the debt. (Tr. 92-93). At a meeting with Bufalino in March, Bufalino asked Napoli why he had failed to keep any of the appointments with Mike Sparber and then put Napoli on the phone with Sparber so that they could make another appointment. (Tr. 95-96). Bufalino also told Napoli if the debt was not straightened out, he would get hurt. (Tr. 505).

After the Florida meeting, Bufalino met with Napoli on two occasions in New York in an effort to get him to pay what he owed. Napoli was ordered to both of these meetings by Michael Sparber. On April 5, 1976 at Johnnie's restaurant, after Napoli told Bufalino he

needed time to get the money together, Bufalino gave him ten days to come up with it. (Tr. 113-15). Subsequently, on April 12, 1976 at the Vesuvio Restaurant Bufalino, this time accompanied by several, men confronted Napoli. In this taped conversation Bufalino plainly threatened to kill Napoli himself and go to jail for it if need be. (At this point Napoli had still not repaid any of the debt). When Napoli assured Bufalino that he would "make good for the things," Bufalino responded, "You'd better take care of it." (Tr. 121-22). From the context of the conversation itself, especially when considered in light of prior events, the jury was more than justified in concluding that Russell Bufalino threatened Napoli with respect to the debt of Jacobs.

POINT IV

The Court's Charge Was Correct.

A. The Court Was Not Required Specifically to Charge the Jury that It Must Find the Defendant Intended to Instill Fear.

Defendant Bufalino complains for the first time on appeal that the court never instructed the jury that they must find that the defendant intended by his threats to instill fear in the victim. However, having totally failed to comply with the requirements of Rule 30, F. R. Crim. P., by making specific objections to the charge before the District Court, defendant's present claim is not now reviewable except for plain error. Fed. R. Crim. 30, 52(b); *United States v. Martinez-Carcano*, 557 F.2d 966 (2d Cir. 1977); *United States v. Araujo*, 539 F.2d 287, 291 (2d Cir. 1976); *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Dozier*, 522 F.2d 224, 228 (2d Cir.),

cert. denied, 423 U.S. 1021 (1975); *United States v. Rivera*, 513 F.2d 519, 526 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975); *United States v. Pravato*, 505 F.2d 703, 704-05 (2d Cir. 1974).

Clearly, this argument, which amounts to nothing more than semantics, does not demonstrate any error, let alone plain error in the charge. Title 18 United States Code, § 894, reads in pertinent part:

“Whoever knowingly participates in any way . . . in the use of extortionate means to collect . . . any extension of credit shall be fined . . . or imprisoned.’

The statutory definition of extortionate means is “any means which involve the use, of an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation or property of any person.” 18 United States Code, § 891(7).

The Court’s charge on the issue read:

In deciding whether a defendant wilfully made implied threats of physical harm or other criminal means to Jack Napoli, you should take into consideration all of the evidence in the case bearing on what a particular defendant intended by his statements and what he actually said to the victim or what he knew that other people had said.

Words, harmless of themselves, may take on a threatening meaning in the context in which they are used. On the other hand, you may decide that the words by defendant in the full context of what was said carried no such threatening significance. The question for you to decide is whether the defendant whose case you are considering intended by his words or actions to give

the impression that physical harm or other criminal means would be used against Jack Napoli if he refused to pay. If so, what in the full context of the conversation or of all of the evidence that you have heard the words actually used by the defendant reasonably appear to you to have stated such threats explicitly or by implication?

As I told you with regard to count 1, it is also true as to count 2 that in order to convict you need not find that the defendant actually intended to cause physical injury to Jack Napoli. You need only find that the defendant intended to threaten Jack Napoli with harm to his person and the words or acts constituted an expressed or implied threat.

It is not necessary that the government prove that Jack Napoli was actually placed in fear by the defendant. Actual fear of harm is not an element which the government must prove in this case. To prevail, the government need only to make a threat of use of violence or other criminal means to cause harm to Jack Napoli. (Tr. 1005).

This charge clearly pointed out to the jury that it had to find more than just threatening words, that, in fact, it had to find that by those words, the defendant "intended... to give the impression that physical harm or other criminal means would be used against Jack Napoli if he refused to pay." This statement is not distinguishable in its meaning from the phrasing now belatedly suggested by the defendant. Nothing in the cases cited by the defendant requires that a jury be charged with the specific words "to instill fear." Far from being plain error, there was no error in the Court's charge.

B. The Court Correctly Charged the Jury as to Finding an Extension of Credit.

Defendants Bufalino and Sparber both claim that Judge Lasker's charge as to an extension of credit directed the jury to find that one existed in this case. This assertion ignores the plain language of the judge's charge, which reads as follows:

Before I describe to you the elements of the offense of conspiring to violate Section 894, let me define the term "extension of credit" as used in the law.

An extension of credit means the making or renewing of a loan or the entering into an agreement, tacit or express, by which payment of any debt or claim, however arising, is deferred, that is, put off or delayed.

Now, as you know, the defendants are charged with using extortionate means to collect the debt or extension of credit alleged from Mr. Jacobs to Mr. Napoli. The fact that the debt or extension of credit in this case came about because Jack Napoli received jewelry from Mr. Jacobs without paying for it does not prevent your finding an extension of credit.

By giving you this instruction, I do not mean to tell you that you must find that there was an extension of credit from Jacobs to Napoli. That is for you to decide. But I do wish you to understand that the mere fact that the property here taken was taken without paying for it does not prevent it from being an extension of credit within the meaning of the law, just as much as an ordinary loan would be an extension of credit within the law. (Emphasis added).

A fair reading of this charge must result in the finding that the judge specifically left it to the jury to decide whether or not there was an extension of credit, an element he correctly defined for them directly from the statute.

Further, contrary to Bufalino's assertion, no counsel ever objected to that part of the court's charge indicating that Napoli received jewelry from Jacobs without paying for it. In fact, throughout the trial, this interpretation of the facts was the position taken by all defense counsel, announced in their openings and argued in their summations. The objection made by counsel to this part of the charge went only to the court's instruction that such a fact pattern did not preclude the jury from finding an extension of credit. This, being a correct statement of the law, cannot be error. (See Point III, *infra*.)

Judge Lasker's statement as to how Napoli originally incurred the debt was a fair comment on the evidence, indeed one arguably helpful to the defendants, and was a position not disputed by defendants. Judge Lasker also made it clear that nothing he said about the facts was evidence. (Tr. 982). In light of these factors, such comment was perfectly permissible. *United States v. Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). See also *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.); *United States v. Fourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).

C. The Trial Court Did Not Err in Refusing to Give an Uncalled Witness Charge as to The Government's Tape Expert.

As his last point, Sparber argues that the District Court erroneously refused to charge that the jury could draw an unfavorable inference against the Government for not calling its tape expert as a witness. He also

complains that the court should not have informed the jury that the defense was given funds to obtain its own expert. (Sparber Br. 59-60). A recitation of the pertinent facts shows that Judge Lasker's decision on both issues was perfectly correct.

First, as to the requested uncalled witness charge, such a charge would have been especially unfair in this case. The expert, Paul Ginsberg, was in court every day, was available to the defendants and, in fact, was utilized by counsel for Sparber during his cross-examination of Jack Napoli. The defendant Sparber made no attempt to interview or subpoena Ginsberg, let alone call him as his witness. Whether or not an uncalled witness charge should be given lies in the sound discretion of the trial court, *United States v. Miranda*, 526 F.2d 1319 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976); *United States v. Llamas*, 280 F.2d 392, 393 (2d Cir. 1960), and no such charge is required when a witness is equally available to either side. *United States v. LaRocca*, 224 F.2d 859 (2d Cir. 1955).

Second, the court's explanation to the jury as to the resources provided by the Government to a defendant to employ an expert was completely justified. In his summation, counsel for Sparber attempted to convince the jury that Napoli altered the tape recordings presented in the Government's case. In so arguing, he specifically stated, "Where could a man like that, who has made his living by falsifying, have altered the tape recordings? I don't know and I don't have the resources to find out. I don't have the resources of the United States Government, certainly." (Tr. 8994). Later, after arguing that the Government should have called an expert to dispute his argument that there was a gap in one of the tapes, counsel for Sparber commented, "We don't have an obligation to prove a case and we don't have the resources to go through all the tapes. . . ." (Tr. 900). These comments obviously implied that the defendant Sparber did not have the funds adequately to examine the tape recordings for tampering,

when, in fact, Sparber received funds from the court to obtain an expert, consulted one but then chose not to call him. (Tr. 923). Accordingly, the court's instruction did no more than correct defense counsel's unfair and misleading argument.

POINT V

The Defendants Received a Speedy Trial.

Bufalino and Sparber argue that their rights to a speedy trial were violated in this case which proceeded to trial nine months after indictment. Specifically, they argue that two excludable periods, specifically granted by the District Court in advance, should now be found by this Court to be non-excludable. These arguments should be rejected.

The defendants were indicted on October 26, 1976 and arraigned on November 4, 1976. At a pre-trial conference held on November 18, 1976, a trial date of March 28, 1977 was set by the Court. During the week of January 10, 1977, Government counsel learned that Geraldine Napoli was pregnant and due to deliver her child on March 29, 1977. (Bufalino App. 9). Accordingly, on January 21, 1977, the Government made a written motion requesting an adjournment to on or after May 15, 1977 on the grounds that Mrs. Napoli was an essential witness for the prosecution and was unavailable due to her physical condition.

In a Memorandum dated February 11, 1977, Judge Lasker granted the Government's motion and adjourned the trial to May 31, 1977. In so doing, the Court concluded: "This adjournment is warranted and the time period involved excludable from the 180-day period within which the defendants must be brought to trial under 18 U.S.C. § 3161(h)(3)(A)." In so concluding, the

court found Geraldine Napoli to be both an "essential witness" and "unavailable" as required by the statute.

On May 16, 1977, the Government requested a second adjournment again because Mrs. Napoli was unable to travel due to hemorrhaging caused by the birth. On June 6, 1977, the trial judge set August 1, 1977 as the new trial date, again reaching the same conclusion that the delay was warranted and the period excludable under the Speedy Trial Act, 18 U.S.C. § 3161(h) (3) (A).

The defendants argue that the resulting delay of approximately nine months between arraignment and trial violated the Southern District's "Plan for Achieving Prompt Disposition of Criminal Cases" the Speedy Trial Act of 1974, 18 U.S.C. § 3161, *et seq.*, and the Sixth Amendment. Looking first to the Plan, the trial of this case should have commenced within 180 days of arraignment. Para 5(a) (2). In computing this time limit under the Plan, however, periods of delay set forth in 18 U.S.C. § 3161(h) are specifically excludable. Para. 10(a). Having thus arrived back at the Speedy Trial Act, the question becomes whether or not Judge Lasker erred when he found the two requested adjournments properly excludable under § 3161(h) (3).

The defendants contend that the Government should have known on November 18, 1976 that Mrs. Napoli was due to give birth in March, 1977 and that the Government's ignorance was the result of a lack of due diligence. They then cite 18 U.S.C. § 3161(3) (B) which provides that "... an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence. . . ." They then speculate that had this information been available, the court could have set an earlier trial date.

The facts are that the prosecutor in this case did not learn of the pregnancy until the week of January 10,

1977.* Once the prosecutor did learn of the pregnancy, no amount of diligence could have made Geraldine Napoli available to testify on March 28, 1977. In lieu of an adjournment, the prosecutor suggested a stipulation as to what Geraldine Napoli would testify to were she called. After reviewing this proposed stipulation, however, all defense counsel expressed a preference for the adjournment.**

As to whether the defendants' Sixth Amendment rights to a speedy trial have been violated, the factors to be considered are: (1) the length of the delay; (2) the reason for it; (3) whether and when the defendant has asserted his right to a speedy trial; and (4) the prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). As this Court pointed out in *United States v. Carini*, 562 F.2d 144 (2d Cir. 1977) these four factors

* Although the defendants attempt to charge the Government with earlier knowledge of the pregnancy merely on the basis of the Napoli's participation in the Witness Protection Program, the record does not support the claim that the Government learned of the pregnancy prior to January 10, 1977.

** Appellants also suggest that the court erred in its findings that Geraldine Napoli was an essential witness. The Government contended that her testimony was essential because she was the only live witness who could corroborate any of Napoli's testimony with respect to threats made against him by the defendants Sparber and Bufalino. In view of the fact that the two main defense contentions were that Napoli was totally incredible and that the tapes were not trustworthy because he may have tampered with them, Geraldine Napoli's testimony was essential if the jury was to be able to make a fair determination of the facts. The Senate Report on the Speedy Trial Act, 120 Cong. Rec. 41622 (1974) states that, "By an 'essential witness' the Committee means a witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice." (Emphasis added). Clearly Judge Lasker was entitled to find that Geraldine Napoli's testimony was essential, in the context of this case, to the interests of justice.

are the components of a balancing test and no one of them is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Quoting *Barker v. Wingo*, *supra* at 533.

Analyzing either of these factors, we find first that the nine month delay in this case is a minor one. Indeed, this Court has found that a twenty-month delay between the filing of an information and trial could not by itself be classified as excessive *per se*. *United States v. Vispi*, 545 F.2d 328 (2d Cir. 1976). Far longer delays have not been found in and of themselves to constitute a violation. *United States v. Carini*, *supra*. (34-month delay found to "trigger" review of other circumstances); *United States v. Lane*, 561 F.2d 1075 (2d Cir. 1977) (58-month delay did not require dismissal); *United States v. Saglimbene*, 471 F.2d 16 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (dismissal not required although six years had elapsed between indictment and trial); *United States v. Fasanaro*, 471 F.2d 717 (2d Cir. 1973) (over four years).

Of course, even a short delay may be "intolerably long in light of the peculiar circumstances of the case." See *United States v. Roberts*, 515 F.2d 642 (2d Cir. 1975) (defendant lost his eligibility to be sentenced as a Youthful Offender because of a fourteen-month delay chargeable to the Government). Even assuming *arguendo* that the delay of approximately four months caused by Geraldine Napoli's unavailability is chargeable to the Government, no such "peculiar circumstances" present themselves here. While the defendants did assert their speedy trial rights here, in timely fashion, they suffered no substantial prejudice.

Bufalino specifically asserts that he suffered the "societal pressure of a public accusation of criminal conduct" citing *United States v. Vispi*, *supra* at 336. Vispi, however, was a lawyer and therefore, susceptible to pro-

fessional injury as a result of his criminal indictment, while Bufalino can make no such claim. Beyond this, however, his claim of societal pressure pales somewhat when viewed in the light of his three prior indictments resulting in one reversed conviction and two acquittals. (S Hr. 5-6).

For his part, the defendant Sparber complains of the delay because it prolonged his difficulty in finding employment and created additional family problems. While these problems are unfortunate consequences of indictment, they are the type that affect every defendant. Clearly, the reason for delay here—the necessity for the Government to present an essential witness—must outweigh any prejudice claimed from a very minor delay.

POINT VI

There Was No Violation of Due Process Resulting From Napoli's Participation in the Witness Relocation Program.

The defendants argue that monies expended on the Government's principal witness in connection with the Witness Relocation Program and alleged favors done for him while in that Program should vitiate this conviction. This argument is frivolous, both because it ignores the facts and because there is no authority in law for this proposition.

First, the \$46,000 characterized by the defendants as a payment to Napoli tantamount to a bribe were monies expended to feed, clothe, house and pay medical expenses for a family of five over a fifteen month period. Included also in this total were the costs of moving Napoli, his family and their household goods on three separate occasions, these moves being at the direction of the Marshal's Service in response to threats to Napoli's life. In no sense were these monies paid to or on behalf of

Napoli on the type of "contingent fee" basis criticized in *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), the case relied on by appellants.

While Bufalino suggests that the FBI employed Napoli to "obtain sufficient information to arrest and to convict Russell Bufalino," (Br. 24), the facts do not support this. At the time Jack Napoli went to the FBI, he had already been threatened by Jacobs, Sparber and Bufalino,* and while relocation was promised to him should he testify in the future, no promises of money were ever made. Similarly, the Government's promise to make his cooperation known to sentencing judges on state charges is a form of Governmental conduct which a cooperating individual would have the right to call upon from the Government whether promised or not.

Lastly, citing Napoli's own criminal conduct both before and after his relocation the defendants seem to argue that this should have some bearing on the bona fides of the prosecution against Bufalino, Sparber and Jacobs. On other occasions, it has been necessary to acknowledge that "the Government's witnesses are rarely pillars of the Church." *United States v. Russo*, 442 F.2d 498, 502 (2d Cir. 1971). While this may be an unfortunate fact, it provides no basis for invalidating the defendants' well deserved convictions.

As for the appellants' reliance on *Rochin v. California*, 342 U.S. 165 (1952), it is totally misplaced. The governmental misconduct in *Rochin* included illegal entry, an unlawful battery and ultimately the forceable use of a stomach pump to obtain evidence from the stomach of the defendant which was the chief evidence against him

* Bufalino's remark that the FBI did not suggest that Napoli return the stolen jewelry to Jacobs overlooks the fact that by the time Napoli went to the FBI he no longer had any of it in his possession.

at trial. The alleged governmental misconduct here, assuming the Marshal's assistance to Napoli as credit references can be categorized as such, could have had no effect on the defendants in this case who had long since committed, and been indicted for, the crimes charged. Similarly, *United States v. Russell*, 411 U.S. 423 (1963) provides no support for their arguments. *Russell* discussed due process rights in the context of entrapment, but found no entrapment even though a Government agent supplied an essential ingredient for LSD to defendants. There are simply no facts in this case to support an entrapment theory and indeed defendants never raised entrapment at trial.

POINT VII

There was No Error in the Sentencing Procedure.

Relying primarily on *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976), Bufalino claims that the trial court committed error by relying at sentencing on its conclusion that Bufalino was dealing in stolen diamonds and on reports that Bufalino was connected with organized crime. This claim is without substance.

First, the court was entitled to conclude that Bufalino was dealing in stolen diamonds with co-defendant Herbert Jacobs. Judge Lasker was the trial judge and he reached this conclusion as he himself stated from "the record of this case." (S Tr. 10).^{*} Moreover, while the judge need not have articulated this conclusion on his part, he did

^{*} The court found the fact that Bufalino did not go to the police to enforce the debt against Napoli as indicative that the diamonds involved were stolen. Another indicia of the questionable nature of the business relationship between Bufalino and Jacobs may also be found in the fact that although Bufalino had no apparent legitimate interest in Jacobs' jewelry business, he took over enforcement of the Napoli debt and was the one to whom Napoli was to pay the money, through Mike Sparber.

so, thereby giving the defendant an opportunity to rebut it. Neither the defendant nor his counsel responded to the court's statement by either denying the allegation or asking for an adjournment of sentence in order to prepare some response.**

Second, with respect to allegations in the pre-sentence report that Russell Bufalino is connected with organized crime, it is clear that Judge Lasker declined to rely on them. In this regard Mr. Bufalino's brief fails to point to the court's statement that:

"I have done my best to eliminate any such reports as a basis for the sentence which I am about to impose." (Tr. 11).

Even *assuming arguendo* that Judge Lasker did rely on either or both of these allegations, the defendant was given every opportunity to respond and he did so. Here, counsel for Bufalino, having been provided with the pre-sentence report some days prior to sentencing, took issue with certain portions of that report calling them "unfair, untrue and unsupported." (S Tr. 6). This is not a case where the defendant had an inadequate opportunity to review the pre-sentence report and was refused an adjournment. See *United States v. Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Virga*, 426 F.2d 1320, 1323 (2d Cir. 1970).

** While it is fair to conclude Judge Lasker based his conclusion as to Bufalino's diamond dealings on his own consideration of the trial record, rather than on allegations contained in the pre-sentence report, such allegations were included in both the pre-sentence report and the sentencing memorandum submitted to Judge Lasker. Even if the judge meant to encompass these reports when he spoke of "the record in the case" however, the trial record certainly corroborates these allegations and while all of the allegations in the pre-sentence report as to Bufalino's criminal activities were disputed generally, no request was made by Bufalino to rebut this specific allegation further.

Presumably, counsel for Bufalino had his own reasons for resting on general denials rather than requesting an evidentiary hearing. Surely, under these circumstances Judge Lasker cannot be held responsible to offer the defendant an adjournment or a hearing when he does not ask for one and in fact goes forward and undertakes to make a response at the time.*

Finally, *United States v. Robin, supra*, is totally inapposite. In that case, unlike here, the defendant offered to present rebuttal evidence to dispute the Government's version of the facts and the court refused to consider it. Further, in remanding for a new sentence the *Robin* Court also pointed to the fact that the sentence came after a plea (rather than a trial on the merits as here) and that the sentence of thirty years was a harsh one (unlike the four year sentence here where the possible maximum was forty years).

Far from there being error in this proceeding, Judge Lasker's statement at sentence showed thoughtfulness and a scrupulous concern for fairness. He enunciated the factors he took into account in arriving at the sentence and it is clear that he took those on Bufalino's side well into account. For, although Bufalino directed a criminal conspiracy to extort and had himself explicitly threatened to kill a man he received a four year sentence which reflected that factors offered in mitigation of sentence received substantial weight from the sentencing court.

* This is not meant to suggest that had Bufalino asked for a hearing such a request should have been granted. Evidentiary hearings are not required whenever the defendant asserts the falsity of some statement in his pre-sentence report. *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973). In fact, it has been held that verbal explanation or comment is often sufficient. *United States v. Carden*, 428 F.2d 1116, 1118 (8th Cir. 1970).

POINT VIII

Separate Sentences May Be Imposed for the Conspiracy and Substantive Offenses under Title 18, U.S.C. § 894.

The law is well settled that conspiracy and the completed substantive offense are separate crimes and that the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *United States v. Feola*, 420 U.S. 671 (1975); *Pinkerton v. United States*, 328 U.S. 640, 644 (1946); and *Braverman v. United States*, 317 U.S. 49, 53 (1942). "Thus it is well recognized that in most cases, separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end." *Iannelli v. United States*, *supra*, at 778. In the face of this authority, Bufalino makes the bald assertion that if Congress had intended separate punishment for the conspiracy and substantive offenses in 18 U.S.C. § 894, separate penalty sections would have been enacted. This is precisely the argument which was made in *Callanan v. United States*, 364 U.S. 587 (1961) with respect to the Hobbs Act and which was rejected by the Court.

In an attempt to distinguish *Callanan*, Bufalino then argues that a Congressional intent to treat the conspiracy and substantive crime separately under 18 U.S.C. 1951, could be implied from the fact that prior to their consolidation the two were treated in separate sections, and that no such argument could be made for 18 U.S.C. Section 894. While the consolidation of what were once two separate sections into one might be interpreted precisely the contrary way, Bufalino's argument must also fail because this reasoning played no part in the rationale of the *Callanan* decision. In fact, the majority made it

clear in *Callanan* that they found no ambiguity within the statute itself and would therefore attribute "to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long established distinction between offenses essentially different". Quoting *United States v. Rabinowich*, 238 U.S. 78, 88 (1915)" The decision did not rely on any narrow interpretation of legislative intent as Bufalino suggests. Similarly, there is no ambiguity in 18 U.S.C. § 894 and the legislative history is devoid of any discussion of the question of multiple penalties.

Further, without squarely reaching the issue as to whether or not charging both a conspiracy and substantive offense under § 894 is multiplicitous, this Court has already stated that it is "unlikely" that such use of the statute should be regarded as charging the same offense. *United States v. DeStafano*, 429 F.2d 344 (2d Cir. 1970), cert denied 402 U.S. 972 (1971).

Bufalino's reliance on *United States v. Sperling*, 560 F.2d 1050 (2d Cir. 1977) is misplaced. In *Sperling*, the Court applied the "Blockburger test" and found the § 846 conspiracy offense to be a lesser included offense of a § 848 continuing criminal enterprise. Applying this test to § 894, Bufalino argues that to prove that an individual "participates" in any way in the use of extortionate means necessarily proves a conspiracy. This is absurd. The essence of conspiracy is an agreement, *Pereira v. United States*, 347 U.S. 1, 12 (1953), an element which is most certainly *not* contained or required for a substantive violation of § 894. To so interpret the substantive section would mean that the lone extortionist, who did not first agree to use extortion with some other party, could never be convicted. Cf. *Jeffers v. United States*, — U.S. —, 53 L. Ed.2d 168 (1977).

Likewise the "same evidence test" which Bufalino presents as a last resort, does not prohibit separate punishment in this case. In both *United States v. Austin*,

529 F.2d 559 (6th Cir. 1976) and *Freeman v. United States*, 146 F.2d 978 (6th Cir. 1945), the conspiracy and substantive counts were considered multiplicitous *only* because the substantive offenses required proof of joint action and that proof was identical to the proof offered on the conspiracy count. No proof of joint action was required to convict any defendant of the substantive violation in this case.

POINT IX

The Trial Court Was Correct in Precluding Evidence of the Lapadura Nolle.

Sparber argues that Judge Lasker committed reversible error when he (1) failed to order the Government to produce as *Brady* material its reason for entering a nolle prosequi as to Joseph Lapadura; (2) refused to allow proof as to the nolle prosequi before the jury and (3) permitted Napoli to testify to the declaration of Lapadura.

Sparber correctly assumes that the Government nolleed the case against Lapadura because the Government decided not to proceed with a case that rested on Napoli's uncorroborated testimony. The trial court, after reviewing *in camera*, the documentation for the nolle, which made precisely this point, did not require the Government to confirm what defense counsel already assumed as the reason for the nolle. As there was nothing exculpatory as to any defendant on trial in this information the court was correct. It did not prove the defendant's innocence directly; *Brady v. Maryland*, 373 U.S. 83 (1963) or even indirectly, by providing impeachment material, *Giles v. Maryland*, 386 U.S. 66 (1967).

Sparber's final claim is also frivolous. On December 28, 1976, at a time when Lapadura was still a defendant

in the case the Government filed a Bill of Particulars stating that there were no unindicted co-conspirators. After deciding to nolle the case as to Lapadura, the Government did not advise counsel that it still considered Lapadura a co-conspirator. Whether the prosecution, under these circumstances has such a duty in the first place is doubtful. A nolle prosequi does not necessarily mean that an individual did not commit the crime with which he was charged; it merely means that the Government does not believe it can successfully prosecute. If counsel were in doubt, they need only have inquired of the Government. They did not.

Judge Lasker was correct in his determination that Lapadura's statements were admissible. The proof showed that he made the threatening statements testified to by Napoli, in the presence of two of the defendants, Sparber and Jacobs, at a meeting at which they were discussing Napoli's debt to Jacobs. They were clearly declarations made by a co-conspirator within the scope of the conspiracy and as such admissible. *Dutton v. Evans*, 400 U.S. 74 (1970).*

* Even if Lapadura were not a co-conspirator, these statements were admissible under Rule 801(d)(2), Fed. R. Evid. The circumstances under which the threats were made show them to be statements which both Sparber and Jacobs adopted.

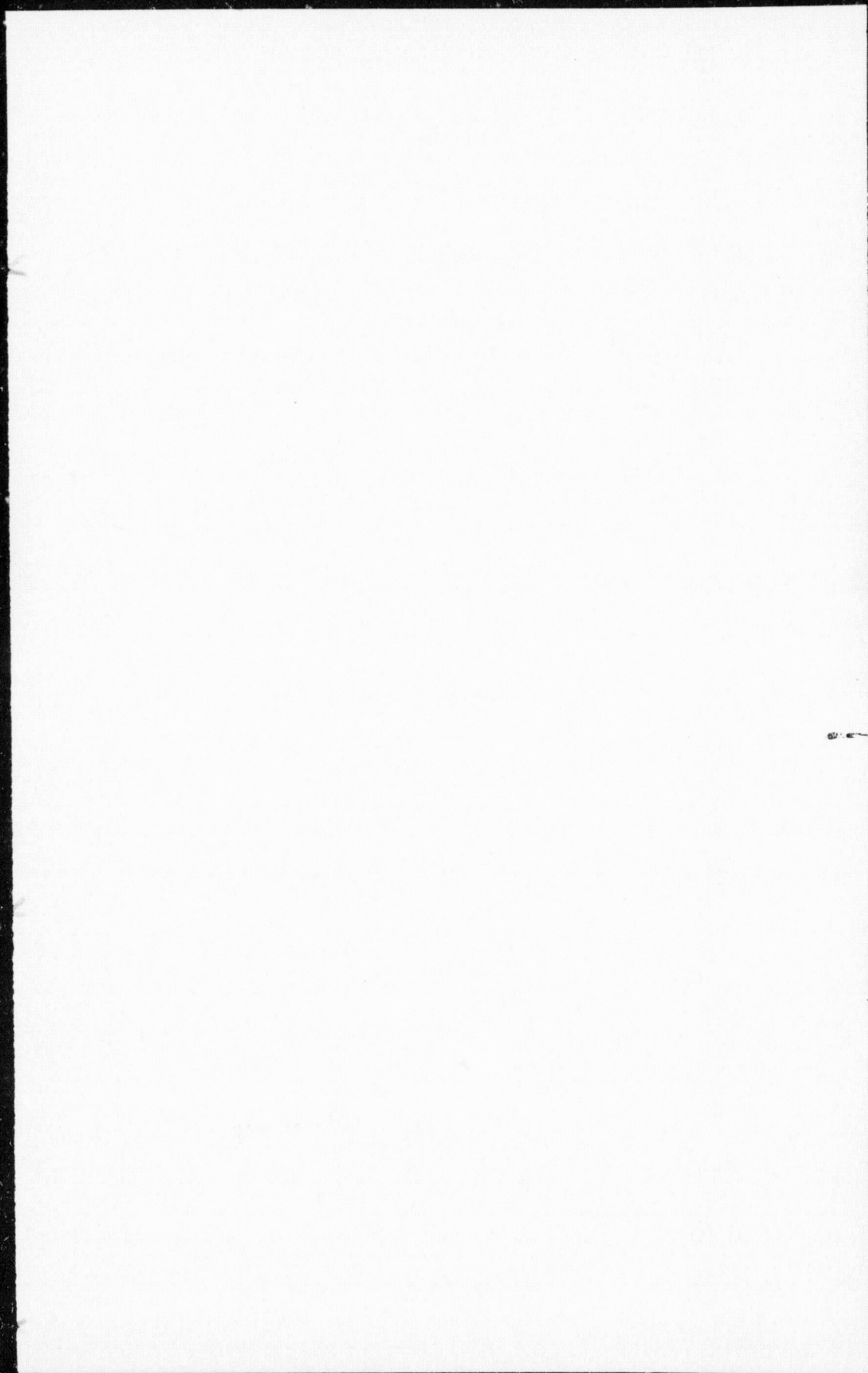
CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

BARBARA S. JONES,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*



AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK)

ss.:

Barbara S. Jones, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26th day of January, 1978
she served 2 copies of the within brief by placing the same
in ~~a~~ properly postpaid franked envelopes addressed:

Wilfred L. Davis, Esq.
67 Wall Street
New York, New York 10005

William J. Gilbreth, Esq.
277 Park Avenue
New York, New York 10017

Arnold E. Wallach
11 Park Place
New York, New York 10007

And deponent further says that she sealed the said envelopes and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Barbara S. Jones

Sworn to before me this

26th day of January, 1978
Elizabeth A. McKeever

ELIZABETH A. McKEEVER
Notary Public, State of New York
No. 43-4629132
Qualified in Richmond County
Commission Expires March 30, 1978